LIBRARY
SUPREME COURT, U. S.

JAN 23 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 977

SIDNEY R. WRIGHT, *Petitioner*

vs.

STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

R. MAX ETTER, SR.
511 Spokane & Eastern Bldg.
Spokane, Washington 99201
Counsel for Petitioner

KERSHAW'S, INC. SPOKANE, WASHINGTON

INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 12

APPENDIX "A"

(1) Opinion below A1

(2) Judgment below (remittitur) A10

AUTHORITIES

Cases

Dancy v. United States, 390 F. 2d 370, (5th Cir. 1968) 7, 8

Gouled v. United States, 255 U.S. 298 8

Hajdu v. State, 189 SO 2d 230 (Florida 1966) 8

Hester v. United States, 265 U.S. 57, 68 L.Ed. 898, 44 Sup. Ct. 445 (1924) 8

Katz v. United States, 389, U.S. 347 ..... 8, 10, 11

Long v. United States, 387 F. 2d 377 (5th Cir. 1967) 7

Lopez v. United States, 373 U.S. 427, 10 L.Ed. 2d 462, 83 Sup. Ct. 1381 (1963) 8, 10

INDEX—Continued

Page

Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 Sup. Ct. 1684 (1961) 2

Monroe v. United States, 234 F. 2d 49, 54, 55 10

On Lee v. United States, 343 U.S. 747, 96 L.Ed. 1270, 72 Sup. Ct. 1967 (1952) 8

Osborn v. United States, 385 U.S. 323, 17 L.Ed. 2d 394, 87 Sup. Ct. 429 (1966) 8

Rathbun v. United States, 355 U.S. 107 10

Silverman v. United States, 365 U.S. 505; 5 L.Ed. 2d 734 (1961) 11

State v. Wright, 74 W.D. 2d 361, 444 P. 2d 676 1

United States v. Haggarty, 388 F. 2d 713 (7th Cir. 1968) 8

United States v. Laughlin, 226 F. Supp. 112 (DDC 1964) 11

Wattenburg v. United States, 388 F. 2d 853 (9th Cir. 1968) 9

CONSTITUTION AND STATUTES

Fourth Amendment, United States Constitution 3

28 U.S.C.A. 1257(3) 2

47 U.S.C. Section 605 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO.

SIDNEY R. WRIGHT, *Petitioner*

vs.

STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner , Sidney R. Wright, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled case on September 23, 1968. (Appendix "A", *infra,* p. A 10, 11).

OPINION BELOW

The opinion of the Supreme Court of Washington (Appendix "A", *infra,* pp. A 1-9) is reported at 74 W.D. 2d 361, 444 P. 2d 676.

NOTE: Transcript paging is marked 0000 to 0427. For clarity, our references will thus be 0 to 427.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on August 22, 1968, and the judgment of the Court was entered and became final on September 23, 1968. An order extending time for filing petition for writ of certiorari was signed by Justice Douglas on December 11, 1968, which extended the time for filing petition for certiorari until January 27, 1969.

The jurisdiction of this Court is invoked upon the grounds that the proceedings in the courts of the State of Washington involved denial of petitioner's right against illegal search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment by *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 Sup. Ct. 1684 (1961). Jurisdiction of this Court to review the judgment of the Supreme Court of Washington is based upon 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

1. Did electronic eavesdropping, accomplished by physical trespass upon premises and home occupied by petitioner, constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution?

2. Did electronic recording of telephone conversations of petitioner by consent of one party to the con-

versation, a police informer, whose consent was given to the police at a time when said informer was charged with a narcotics violation, and at a time when her husband, charged jointly with her was convicted and in Federal prison, a violation of Section 605 of the Federal Communications Act?

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

47 U.S.C., Section 605, provides as follows:

"Unauthorized publication or use of communications.

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any com-

munication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT OF THE CASE

Petitioner was charged by Information with Abortion, Attempted Abortion, and Practicing Medicine without a License (Tr. p. "0"). He was tried before a jury, found guilty of Abortion and Practising Medicine Without a License. (Tr. 1). Motion for New Trial was made and denied. (Tr. pp. 2-4, 5). On appeal, conviction was affirmed.

One Carolyn Singleton, while charged with narcotics possession, embarked on an added career as an informer and police agent. At the time she became an informer, but before her trial, her husband who had been charged

jointly with her for narcotics violation, had been convicted and sentenced to McNeil Federal Prison. The Singleton woman had also had other criminal arrest records at the time. (Tr. pp. 23, 40, 42). She was wired for sound. (Tr. p. 24). A canvas harness was fitted over her shoulder with an electronic transmitter located in the pocket under the arm, and an antenna was wrapped around her body at the bra location, with a tie clip microphone attached. (Tr. pp. 27, 49, 76). In order to make her effective, the receiving device was placed in a police car that would pick up the transmission from the informer. (Tr. p. 82). This conversation could be monitored and heard by earphones through the electronic receiving device, and it was recorded. (Tr. pp. 73, 79, 225-228).

Prior to the execution of the plan to secure evidence against petitioner, who was suspected of committing an abortion, the witness Singleton twice called him on the telephone. These calls, along with others, were electronically monitored and recorded by the police who were in attendance, and were so recorded with the permission of the informer Singleton. (Tr. pp. 24, 25, 26).

Witness Singleton, outfitted with the transmitter, and with marked money, called at the petitioner's home and discussed the matter of abortion, returning later the same evening at approximately 6:00 P.M. She was full equipped with transmission device. Upon entry into the home, the witness and petitioner went to the basement of his home where there was a table with a plastic

sheet and other devices. The witness removed her clothing and a colloquy ensued between petitioner and the witness Singleton with respect to whether or not her heart should be checked. The witness went to a bathroom where she removed her garments and the electronic transmitting device, whispering through it to the police who were parked on the petitioner's premises, "give me five minutes." Petitioner having examined the bathroom, inquired about the equipment which the witness Singleton told him was a narcotic outfit. (Tr. pp. 24-34). Shortly after the signal of the witness was electronically transmitted to the police, they knocked on the door, entered and arrested the petitioner, and without warrant seized over sixty articles, including medical instruments, medications, etc. (Tr. pp. 35, 36, 85, 131. Index of Transcript pp. 10, 11, 147, 148, 149).

The police car and its occupants with their electronic recording and eavesdropping equipment, received the conversation of the police informer and petitioner and the signal for entry, while the police car and equipment was in the private driveway and on the premises of the petitioner immediately adjacent to his home. It was only at this place that intelligible conversation could be received with the transmitting and receiving equipment. (Tr. pp. 188, 189, 195, 196, 200, 215).

Motion was made to suppress exhibits and the testimony concerning conversation received by electronic transmission (Tr. pp. 217 et seq) and denied by the Court. (Tr. pp. 221, 222). At the same time and in the

same motion it was further moved to suppress the evidence, and the Court denied the motion. Motion was made to strike all conversation on the tape recording (Tr. p. 233) and (Tr. pp. 234, 235), and the Court denied both motions. (Tr. pp. 234, 235). Motion was made to dismiss Counts I and II (Tr. p. 401, 402). Motion was denied by the Court (Tr. p. 402). Basis of the motions was violation of federal rights guaranteed to petitioner by the Fourth Amendment. No question was raised in the Washington State Supreme Court with respect to these motions.

REASONS FOR GRANTING THE WRIT

The posture of facts shows deceit by the police agent Singleton in gaining entry to petitioner's home, and an admitted trespass upon the petitioner's property by police officers in a police car containing an electronic receiving and recording device. The officers, while almost immediately adjacent and within a short distance of the outside walls of the petitioner's home, received the conversations by way of an electronic transmitter hidden upon an informer who broadcasted those conversations of the petitioner which she solicited. As a part of the plan, the informer and solicitor transmitted a signal for the police, who being engaged in trespass, entered the premises of the petitioner and made search and seizure without warrant.

The Supreme Court of the State of Washington relied on *Dancy v. United States,* 390 F. 2d 370 (5th Cir. 1968), and *Long v. United States,* 387 F. 2d 377 (5th

Cir. 1967), holding that there was continued viability of *On Lee v. United States,* 343 U.S. 747, 96 L. Ed. 1270, 72 Sup. Ct. 1967 (1952); *Lopez v. United States,* 373 U.S. 427, 10 L. Ed. 2d 462, 83 Sup. Ct. 1381 (1963); and *Osborn v. United States,* 385 U.S. 323, 17 L. Ed. 2d 394, 87 Sup. Ct. 429 (1966). The Supreme Court of Washington also held that the trespass (which it conceded) merely allowed corroboration of evidence freely revealed by the petitioner, and relied upon the "open field" doctrine set out in *Hester v. United States,* 265 U.S. 57, 68 L. Ed. 898, 44 Sup. Ct. 445 (1924).

At odds with the opinion and reasoning of the Washington State Supreme Court is *United States v. Haggarty,* 388 F. 2d 713 (7th Cir. 1968), *Katz v. United States,* 389 U.S. 347, and *Hajdu v. State,* 189 SO 2d 230 (Florida 1966). In addition the dissent of Judge Fahy, Senior Circuit Judge of the District of Columbia Circuit D.C., sitting by designation in *Dancy,* supra, more clearly defines the view of this Court in the light of its opinions in *Katz,* supra, *On Lee v. United States,* 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270; and *Osborn v. United States,* 385 U.S. 323, 17 L. Ed. 2d 394, 87 S. Ct. 429, also relied on by the Washington State Supreme Court is clearly distinguishable from this case, for in *Osborn,* supra, there was prior judicial approval of the challenged recording. *Hajdu v. State,* supra, closely parallels in fact this present case, and there the Florida Court, rather than attempting to justify an intrusion as an invitation by the accused, condemned the procedure used as deceitful, citing *Gouled v. United States,*

255 U.S. 298, as authority for the rule that the Fourth Amendment may be violated by guile as well as by foreseeable intrusions into a constitutionally protected area.

Wattenburg v. United States, 388 F. 2d 853 (9th Cir. 1968) in nowise supports the reasoning of the Supreme Court of Washington. There the defendant who was owner, operator and resident of a lodge, had cut a number of Christmas trees, in what was claimed to be government forest land, and had stacked them in an area about 20 to 35 feet of the lodge and within about 5 feet of its parking lot. Government officials conducted a search of the stockpile and seized certain trees and parts of trees. These were admitted in evidence in the trial court. It was held that Wattenburg was protected against unreasonable search and seizure, the Court holding:

> "The protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto. The differentiation between an immediately adjacent protected area and an unprotected open field has usually been analyzed as a problem of determining the extent of the 'curtilage.'"

The Court held that the stockpile of trees was within the curtilage of the house, and added:

> "We wish to add, however, that it seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private

> even in an area which, although adjacent to his home, is accessible to the public. See *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576, decided December 18, 1967. As the Supreme Court said in Katz, 'the Fourth Amendment protects people, not places.' "

The Washington State Supreme Court attempting to sustain the admission of the electronically transmitted evidence, held that it was corroborative of the informer, and disregarded the plain fact that the eavesdropping and transmission was for the purpose of enabling the police to seize evidence and catch the petitioner. Under the circumstances, transmission recording here was independent third party evidence. (*Monroe v. United States,* 234 F. 2d 49, 54, 55).

The Washington State Supreme Court gave no heed to objections to the use of electronic recording of telephone conversations taken by the police with the consent of their own prisoner. Here the police in fact intercepted the telephone message. And reliance by the Washington State Supreme Court on *Rathbun v. United States,* 355 U.S. 107, is misplaced. It was nowhere held there that all electronic transcription of telephone conversations was approved, if there was one consenting party, and the decision was limited to the question of statutory construction. See Dissent, Mr. Justice Brennan, *Lopez v. United States,* 373 U.S. 427, 10 L. Ed. 2d 463, 83 S. Ct. 1381. Furthermore, this case presents an involuntary rather than a voluntary consent, for here the consenting party was an individual charged with narcotics possession, whose husband had

already been committed to prison for the same transaction. It would be the height of naivete' for one to believe that the witness Singleton voluntarily consented to the interception of telephone conversations by the police. See *United States v. Laughlin,* 226 F. Supp. 112. (DDC 1964).

The Supreme Court of the State of Washington entirely overlooked the admitted, continuing trespass by the police officers engaged in eavesdropping, a procedure condemned in *Silverman v. United States,* 365 U.S. 505; 5 L. Ed. 2d 734 (1961). And in its holding sustaining the arrest (and search and seizure) the State Court overlooked this Court's language in *Katz,* supra:

> "Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello v. United States,* 206 U.S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . .' *Wong Sun v. United States,* 371 U.S. 471, 481-482. 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' *United States v. Jeffers,* 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by a judge or a magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.
>
> "It is difficult to imagine how any of these exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an

individual's arrest could hardly be deemed an 'incident of that arrest.' Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent." (pp. 355, 356, 357).

CONCLUSION

For the reasons set out above, we believe the writ of certiorari should be granted.

Respectfully submitted,

R. MAX ETTER, SR.
511 Spok ne & Eastern Bldg.
Spokane, Washington 99201
Counsel for Petitioner

January, 1969.

APPENDIX A
OPINION BELOW
IN THE
Supreme Court of the State of Washington

STATE OF WASHINGTON, *Respondent,* vs. SIDNEY R. WRIGHT, *Appellant.*	No. 39650 Department Two Filed AUG. 22, 1968

WIEHL, J,*—Defendant, Sidney R. Wright, was convicted by a jury of the crimes of abortion and the unlawful practice of medicine. Both crimes were committed on December 9, 1966. A third count of the information charging defendant with attempted abortion upon a police agent on December 21, 1966, was dismissed for want of an overt act.

Investigation commenced when the police were notified by hospital authorities that Sandra Murray had been admitted as an emergency case suffering from the effects of an apparent abortion upon her. She was approximately 2½-months pregnant. The police asked Murray for a statement, and on advice from her attorney, she decided to admit to the prosecuting attorney that she had engaged defendant to induce an abortion on her. At trial, both Murray and her mother, who had paid for the abortion, testified that defendant had used

* Judge Wiehl is serving as a judge pro tempore of the Supreme Court pursuant to Art. 4, § 2(a) (amendment 38), state constitution.

abortifacients on her which were successful according to testimony by examing physicians.

The police procured the services of Carolyn Singleton, who agreed to act as a police agent. She telephoned the defendant on two occasions and arranged an appointment in his home. The calls were monitored and recorded by the police. The agent kept the appointment and arrived armed with a radio transmitting device concealed in her clothing. Defendant escorted her to his basement which was outfitted with medical equipment, explained the abortion procedure, asked a fee of $300 and requested the agent to return that evening for the abortion. Prior to her return, the agent made a third telephone call to the defendant which was also monitored. Defendant asked the agent to come to his home immediately. The agent, who had been in contact with the police in the interim, returned, again equipped with the transmitter. Defendant again led her to his basement where the $300 fee was paid in marked currency.

Upon defendant's insistence that he must check her heart before proceeding with the abortion, the agent went to the bathroom, removed the transmitter and requested the monitoring police to wait five minutes before intruding. The police who were monitoring and recording the conversation had by this time pulled their unmarked vehicle into defendant's driveway as an aid to their electronic reception of the conversation.

Having satisfied himself that the agent's heart was sound, defendant approached his instrument tray and removed the lid, when he was interrupted by a noise

which he felt compelled to check. At this point, the police knocked, informed defendant of their identity and his arrest.

Approximately 60 pieces of evidence were seized and ultimately admitted into evidence. Most of the exhibits consisted of medical paraphernalia and equipment which were seized in defendant's basement "clinic." The marked money and the tape recording containing all the monitored conversations were also admitted.

The sole issue presented to this court is whether the seized exhibits, the tape recording and the testimony of the monitored conversations should have been suppressed as the products of an illegal search and seizure violative of the Fourth Amendment of the United States Constitution made applicable to the states through the Fourteenth Amendment by *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 Sup. Ct. 1684 (1961). Defendant urges that *Katz v. United States,* U.S. , L. Ed. 2d , 88 Sup. Ct. 507 (1967), is dispositive of the question presented. Having examined the opinion closely, we are constrained to disagree.

In *Katz,* government agents attached an electronic listening and recording device to the outside of a public telephone booth to procure evidence of defendant's suspected illegal interstate transmittal of wagering information. The Court of Appeals held there was no Fourth Amendment violation because there was no physical entrance into an area occupied by the defendant. The Supreme Court, reversed, holding the recordings of the

defendant's part in the conversations were inadmissible and said at 512 that the "reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Neither party to the conversations had consented to the surveillance and the court found that the Fourth Amendment protected defendant's right to exclude the "uninvited ear" even though the calls were placed from a public telephone booth.

In the instant case, the defendant invited the informer into his home, fully cognizant of the risk that she might be a police agent, who could testify against him in a subsequent prosecution.[1] In the present case, the police agent concealed on her person the transmitter which she carried into the confines of defendant's establishment enabling the conversation between her and the defendant to be monitored and recorded.

Mr. Justice White in his concurring opinion in *Katz, supra,* points out in a footnote at 88 Sup. Ct. 507, 517, that *Katz* does not affect previous cases which have allowed admission of evidence obtained:

> (2) by a recording device hidden on the person of such an informant, *Lopez v. United States,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963); *Osborn v. United States,* 385 U.S. 323, 87 S. Ct., 429, 17 L. Ed. 2d 394 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location. *On Lee v. United States,* 343 U.S.

[1] *Hoffa v. United States,* 385 U.S. 293, 17 L. Ed. 2d 374, 87 Sup. Ct. 408 (1966), held that the Fourth Amendment does not protect a defendant from the risk of misplaced confidences.

> 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra* (385 U.S. 293, 17 L. Ed. 2d 374, 87 Sup. Ct. 408 (1966)). It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

Dancy v. United States, 390 F. 2d 370 (5th Cir. 1968), decided subsequent to the *Katz* decision, and *Long v. United States,* 387 F. 2d 377 (5th Cir. 1967), published subsequent to the *Katz* decision, ruled admissible, evidence procurred by a government agent or informer who carried a concealed transmitter while engaging defendant in incriminatory conversations. The basis of the holdings was the continued viability of *On Lee v. United States,* 343 U.S. 747, 96 L. Ed. 1270, 72 Sup. Ct. 967, (1952); *Lopez v. United States,* 373 U.S. 427, 10 L. Ed. 2d 462, 83 Sup. Ct. 1381 (1963); and *Osborn v. United States,* 385 U.S. 323, 17 L. Ed. 2d 394, 87 Sup. Ct. 429 (1966).[2]

[2]Defendant urges that *United States v. White* F. 2d (7th Cir. 1968), slip opinion, March 18, 1968, is contra to the *Lopez v. Osborn* and *On Lee* cases, *supra,* and is a correct interpretation of the *Katz* decision, *supra,* but in White, the police agent monitoring the conversation was not allowed to testify because the informer himself did not testify. In the present case, the agent testified, two of the monitoring police testified, and the tape recording was admitted. Thus, the defendant was not deprived of his right of cross-examination which seems to be the evil sought to be protected against by Chief Justice Warren in his concurring opinion in *Lopez, supra.*

We agree with these interpretations of the *Katz* case, *supra,* and find no violation of defendant's rights by virtue of the concealment of the transmitter on the person of the police informer making possible the monitoring and transcription of the conversations.

Defendant contends that the trespass into his driveway for the purpose of a clearer reception of the transmitted conversation taints all evidence seized subsequent to the trespass. We cannot agree. Any search and seizure which took place by virtue of the transmittal and recording of the conversation, took place within the defendant's home and is permissible under the rationale of the *On Lee, Lopez,* and *Osborn* cases cited above. There was no invasion of defendant's privacy committed in the driveway. The trespass made possible no probe into secret places or conversations. It was within the confines of his "clinic" that defendant knowingly and willingly surrendered his privacy by exposing both his occupation and the tools of his trade to the agent, thus risking that the person whom he invited inside would make public what she had heard and seen.[3] The

[3]Even if we assume that the seizure of the conversation took place in the driveway by means of a trespass, defendant's argument urging suppression of the recording and testimony of the monitoring police must fail because of the "open field" doctrine set out by Mr. Justice Holmes in *Hester v. United States,* 265 U.S. 57, 68 L. Ed. 898, 44 Sup. Ct. 445 (1924), and the cases adhering to that rule. *McDowell v. United States,* 383 F. 2d 599 (8th Cir. 1967); *United States v. Benson,* 299 F. 2d 45 (6th Cir. 1962); *Giacona v. United States,* 257 F. 2d 450 (5th Cir. 1958); *Hodges v. United States,* 243 F. 2d 281 (5th Cir. 1957); *Care v. United States,* 231 F. 2d 22 (10th Cir. 1956); *Martin v. United States,* 155 F. 2d 503 (5th Cir. 1946); *Koth v. United States,* 16 F. 2d 59 (9th Cir. 1926); *United States v. Myers,* 219 F. Supp. 908 (E.D. Pa. 1963); *United States v. Rogato,* 39 F. 2d 171 (M.D. Pa. 1930); *State v. Gillingham,* 36 Wn. 2d 655, 220 P. 2d 333 (1950).

trespass merely allowed corroboration of evidence freely revealed by defendant, and thereby insured the reliability of that evidence. Thus, in the words of Mr. Justice White quoted above:

> It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

The seizure of the medical paraphernalia and equipment was not violative of the Fourth Amendment since it was made incident to a valid arrest. The police had probable cause to arrest the defendant, independent of any information gained by use of the conversation monitored on defendant's premises. The police, in the instant case, had been informed of a prior abortion committed by the defendant at the same location, they had been in close contact with their agent immediately prior to her entry into defendant's home and knew the purpose for which defendant had invited the agent into his

Although exactly where the curtilage ends and the open field begins is answered only on a case to case basis, we do not consider defendant's driveway in the present case to fall within the curtilage. Nor do we consider the driveway within the protection accord d the defendant in *Wattenburg v. United States,* 388 F. 2d 853, 857 (9th Cir. 1968), wherein the court found an area immediately adjacent to defendant's abode within the curtilage and stated: "We wish to add, however, that it seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public." The court decided defendant, by placing a stockpile of trees near his abode, sought to protect it from a warrantless meticulous examination by government agents. The agents seized several trees from the stockpile which were found to match stump cuts made on government lands. The evidence so acquired was used in the prosecution of the defendant.

home. The police had sufficient knowledge of the circumstances to support the belief of a cautious but disinterested man that defendant had committed a felony and was about to commit another. *State v. Bellows,* 72 W.D. 2d 263, 432 P. 2d 654 (1967); *State v. Green,* 70 W.D. 2d 926, 425 P. 2d 913 (1967); *State v. Davis,* 69 Wn. 2d 127, 417 P. 2d 622 (1966); *State v. Baxter,* 68 Wn. 2d 416, 413 P. 2d 638 (1966); *State v. Massey,* 68 Wn. 2d 88, 411 P. 2d 422 (1966); *State v. Biloche,* 66 Wn. 2nd 325, 402 P. 2d 491 (1965); *State v. Darst,* 65 Wn. 2d 808, 399 P. 2d 618 (1965).

Defendant was arrested upon the entry into his basement by the police and the subsequent search of the basement "clinic" was incident to the arrest. This court in *State v. Cook,* 70 W.D. 2d 691, 694, 424 P. 2d 1006 (1967), quoted *State v. Biloche, supra,* at 327:

> The law is equally clear that a search without a warrant may be made incident to an otherwise lawful arrest without a warrant where the arresting officers had reasonable grounds to believe that a felony had been, was being or was about to be committed by the person arrested. *State v. Darst,* 65 Wn. 2d 808, 399 P. 2d 618 (1965); *State v. Hughlett,* 124 Wash. 366, 214 Pac. 841 (1923); *Ker v. California,* 374 U.S. 23, 10 L. Ed. 2d 726, 83 Sup. Ct. 1623 (1963).

The trial court committed no error in admitting the evidence which defendant sought to suppress.

The state cross-appeals, urging the trial court's dismissal of the charge of attempted abortion was error.

We find no error. In *State v. Lewis,* 69 Wn. 2d 120, 123, 417 P. 2d 618 (1966), we said:

> The state, in a prosecution for an attempted crime, must prove that the defendant actually intended to commit the target crime, and that he performed an *overt act* directed toward its commission. There must be a unity of intent and overt act. Both elements must coincide. *State v. Christensen,* 55 Wn. 2d 490, 348 P. 2d 408 (1960); *State v. Leach,* 36 Wn. 2d 641, 219 P. 2d 972 (1950); 1 Wharton, Criminal Law and Procedure § 71, p. 152 (1957); 21 Am. Jur. 2d *Criminal Law* § 110 (1965).

The judgment is in all respects affirmed.

WIEHL, J, *Pro Tem*

WE CONCUR:

HILL, J.

ROSELLINI, J.

HAMILTON, J.

NEILL, J.

IN THE

Supreme Court of the State of Washington

STATE OF WASHINGTON,
Respondent,

vs.

SIDNEY R. WRIGHT,
Appellant

REMITTITUR
No. 39650
Spokane County
No. 18481

The State of Washington to: The Superior Court of the State of Washington, in and for Spokane County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on August 22, 1968, became the final judgment of this court in the above entitled case on September 23, 1968. This cause is remitted to the Superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

(43) Pursuant to Rule 55 on Appeal, costs are taxed as follows:

One hundred ninety-nine and 44/100 dollars ($199.44) in favor of respondent and against appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 30th day of September, A.D. 1968.

(Signed) WILLIAM M. LOWRY

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

(SEAL)

FILED

OCT. 1, 1968

Geo. E. Fallquist, Clerk
Spokane County

EXECUTION 92, PAGE 617 MICROFILM